

No. 15869 ✓

United States
Court of Appeals
for the Ninth Circuit

ALBERS MILLING COMPANY, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California,
Central Division

FILED

MAR 12 1958

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

JOHN H. MAYNARD,
WILLIAM H. BIRNIE,

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Los Angeles 36, California.

For Appellee:

CHARLES K. RICE,

Assistant U. S. Attorney General,
Tax Division, Dept. of Justice,
Washington 25, D. C.,

LAUGHLIN E. WATERS,

United States Attorney,

JOHN G. MESSER,

Assistant U. S. Attorney,

808 Federal Building,
Los Angeles 12, California. [1]*

* Page numbers appearing at bottom of page of Original Transcript of Record.

In the District Court of the United States, South-
ern District of California, Central Division

No. 20216PH

ALBERS MILLING COMPANY, a Corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

COMPLAINT FOR REFUND OF TAXES

Plaintiff complains of Defendant and alleges as follows:

I.

Plaintiff, Albers Milling Company, at all times herein mentioned was and is now a corporation duly organized and existing under the laws of the State of Oregon, and qualified to do business in the State of California, with its general offices and principal place of business located in the City of Los Angeles, County of Los Angeles, State of California, within the jurisdiction of this Court.

II.

This Court has jurisdiction of this cause under the provisions of Title 28, United States Code, Section 1346 (a).

III.

During the period July 7, 1950, to October 31, 1950, Plaintiff shipped various quantities of its

goods and merchandise between [2] points in the United States over the lines of various railroads, and paid by check delivered in Vancouver, British Columbia, Dominion of Canada, to their agent or agents there situated, the freight charges regularly charged by said railroads for such shipments. In addition to said freight charges, said railroads wrongfully demanded and collected from Plaintiff the tax upon the transportation of property imposed by Section 3475 of the Internal Revenue Code of 1939 as then in effect. Said tax was based upon said freight charges and was paid by Plaintiff at the same time and place as the respective freight charges were paid. The names of said railroads and the amounts of transportation taxes alleged to have been erroneously and illegally collected by them from Plaintiff is as follows:

Name and Head Office Address of Railroad	Tax Erroneously Collected
Southern Pacific RR. 65 Market St., San Francisco 5, Calif.	\$16,189.57
Union Pacific RR. 120 Broadway, New York 5, N. Y.	2,946.30
Northern Pacific Ry. 176 E. 5th St., St. Paul 1, Minn.	4,050.60
Chicago, Milwaukee, St. Paul & Pacific RR. 516 W. Jackson Blvd., Chicago 6, Ill.	1,293.64
Spokane, Portland & Seattle Ry. 1101 N. W. Hoyt St., Portland 7, Ore.	1,086.79

Oregon Electric Ry.	5.04
1101 N. W. Hoyt St., Portland 7, Ore.	
Pacific Motor Trucking Co.	4.11
65 Market St., San Francisco 5, Calif.	
Great Northern Ry.	2,451.79
175 E. 4th St., St. Paul 1, Minn.	
	<hr/>
Total	[3] \$28,027.84

IV.

Plaintiff is informed and believes that, and on that ground alleges that each of said railroads paid the entire sum collected by each as a tax as aforesaid to the Collector of Internal Revenue in their respective Collection Districts as follows:

Railroad	Paid to Collector of Internal Revenue at:
Southern Pacific RR.	San Francisco, California
Union Pacific RR.	Omaha, Nebraska
Northern Pacific Ry.	St. Paul, Minnesota
Chicago, Milwaukee, St. Paul & Pacific RR.	Chicago, Illinois
Spokane, Portland & Seattle Ry.	Portland, Oregon
Oregon Electric Ry.	Portland, Oregon
Pacific Motor Trucking Co.	San Francisco, California
Great Northern Ry.	St. Paul, Minnesota

and that neither the whole nor any part of said sums has been refunded to any of said railroads by Defendant.

V.

The collection of said sums and the payment thereof to the respective Collectors of Internal Revenue was erroneous and illegal because Section 3475 of the Internal Revenue Code of 1939, as then in effect, imposed the tax only upon the amount paid within the United States for the transportation of property, whereas the amounts paid for the transportation of property, the tax upon which is here in dispute, were paid in the Dominion of Canada.

VI.

On or about August 4, 1953, Plaintiff duly filed with the District Director of Internal Revenue in Los Angeles, California a claim for refund of the full amount of the aforesaid taxes illegally collected by the said railroads, plus interest. The claim was for the sum of \$29,299.35 plus interest. [4]

VII.

By letter dated July 23, 1954, the District Director of Internal Revenue in Los Angeles advised Plaintiff that its claim for refund had been disallowed in full.

VIII.

Of the amount of \$29,299.35 demanded on the claim, Plaintiff is here bringing suit for \$28,027.84, plus interest, as aforesaid, and Plaintiff waives recovery of the balance of \$1,271.51.

IX.

No part of said sums has been repaid to Plaintiff

by the respective railroads or by the Defendant to the Plaintiff and Plaintiff has not consented to the allowance of credit or refund of any of said sums to the respective railroads.

X.

By reason of the foregoing, Defendant has become and is indebted to the Plaintiff in the amount of \$28,027.84, together with interest thereon as provided by law.

XI.

Plaintiff is and always has been the sole owner of the claim referred to herein, and has not assigned or transferred the whole or any part thereof or interest therein.

Wherefore, Plaintiff prays judgment against Defendant for the sum of \$28,027.84, together with interest, as provided by law, together with Plaintiff's costs of court incurred herein and such other and further relief as to this Court may seem proper and just.

Dated this 18th day of July, 1956, at Los Angeles, California.

JOHN H. MAYNARD,
ROBERT W. DRISCOLL,
/s/ By JOHN H. MAYNARD,
Attorneys for Plaintiff. [5]

[Endorsed]: Filed July 18, 1956.

[Title of District Court and Cause.]

ANSWER

The defendant, the United States of America, by its attorney, Laughlin E. Waters, Esquire, United States Attorney in and for the Southern District of California, denies all allegations of the complaint not admitted, qualified or otherwise referred to below.

The defendant further answers as follows:

First Defense

As its first defense defendant asserts that venue for the instant suit does not lay within the Southern Judicial District of California. According to paragraph 2 of the complaint the action is brought under Section 1346(a), Title 28, United States Code. Plaintiff is a corporation organized and existing under the laws of the State of Oregon. (See paragraph 1 of the complaint.) Section 1402(a), Title 28, United States Code, provides that a civil action against the United States brought, as here, [6] under 28 U.S.C., Section 1346(a) may be brought only in the judicial district where the plaintiff resides. Thus, venue for this suit lays only in the Judicial District of Oregon, the District of plaintiff's residence.

Accordingly, it is respectfully urged that this Court, under the provisions of 28 U.S.C., 1406(a), either dismiss this action or, if it be in the interest of justice, transfer it to the District of Oregon.

Second Defense

1. Denies the allegations of paragraph 1 of the complaint but admits that plaintiff was during all times material to this action and is now a corporation duly organized and existing under the laws of the State of Oregon.

2. Denies the allegations of paragraph 2 of the complaint.

3. Avers that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 3 of the complaint but admits that during the period July 7, 1950 to October 31, 1950 plaintiff shipped certain of its property by domestic rail and motor carrier between points within the United States. Defendant further admits that included in the various carriers' charges for these transportation services was the 3 per cent Transportation Tax imposed by Section 3475, Internal Revenue Code of 1939. Finally, defendant admits that plaintiff paid the carriers' charges, including the tax referred to, by having one of its employees travel to Vancouver, B. C. and there deposit with the domestic carriers' Canadian agents checks drawn on plaintiff's accounts located in both domestic and Canadian banks.

4. Avers that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the complaint. [7]

5. Denies the allegations of paragraph 5 of the complaint.

6. Admits the allegations of paragraph 6 of the

complaint except that it denies that plaintiff is entitled to recover on any of the grounds set forth in said claim for refund and denies all allegations of fact contained therein except those expressly admitted herein.

7. Admits the allegations of paragraph 7 of the complaint.

8. Admits the allegations of paragraph 8 of the complaint.

9. Avers that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 9 of the complaint.

10. Denies the allegations of paragraph 10 of the complaint.

11. Avers that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 11 of the complaint.

Wherefore, the defendant prays that the complaint be dismissed and that judgment be entered in its favor with costs against the plaintiff.

LAUGHLIN E. WATERS,

United States Attorney,

EDWARD R. McHALE,

Assistant U. S. Attorney,

Chief, Tax Division,

JOHN G. MESSER,

Assistant U. S. Attorney,

/s/ JOHN G. MESSER,

Attorneys for Defendant,

United States of America. [8]

Affidavit of Service by Mail Attached. [9]

[Endorsed]: Filed September 18, 1956.

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto through their respective counsel, without prejudice to the rights of any party herein to introduce additional evidence not inconsistent herewith, and without prejudice to their right to object to the materiality or relevancy of any of the facts agreed to, during the periods involved in this action, as follows:

1) Albers Milling Company, the Plaintiff, at all times herein mentioned was and is now a corporation duly organized and existing under the laws of the State of Oregon.

2) Plaintiff is qualified to do business in the State of California and has its general offices and principal place of business in the City of Los Angeles, County of Los Angeles, California.

3) During the period from July 7, 1950 to [9-A] October 31, 1950 the Plaintiff shipped various quantities of its goods and merchandise between various points in the United States over the lines of Southern Pacific Railroad, Union Pacific Railroad, Northern Pacific Railway, Chicago, Milwaukee, St. Paul & Pacific Railroad, Spokane, Portland & Seattle Railway, Oregon Electric Railway, Pacific Motor Trucking Company and Great Northern Railway. All such shipments originated and terminated within the United States. These railroads, including Pacific Motor Trucking Company, sent their bills

for freight for the aforesaid shipments to the Plaintiff at its offices in the United States. These bills, together with the checks of the Plaintiff in payment thereof, were mailed by the Plaintiff to the office of Carnation Company, Limited, an affiliated company, in Vancouver, British Columbia, Dominion of Canada. A full-time bona fide employee of one of Plaintiff's feed stores, Mr. D. L. Grout, traveled twice each week from Bellingham, Washington, to Vancouver, British Columbia, picked up the freight bills and the checks for the payment thereof at the office of Carnation Company, Limited and presented them to the agents of the aforesaid carriers in Vancouver, who accepted the checks in payment and recorded the bills as paid. Plaintiff's only purpose in mailing checks in payment of said bills to its Canadian affiliated company and in having Mr. Grout travel from Bellingham, Washington, to Vancouver, British Columbia, and to deliver said checks in payment of the freight bills to Canadian agents of said carriers in Canada was to save transportation taxes.

4) The railroads also added to the amounts of their freight bills and demanded from Plaintiff payment of the federal tax upon the transportation of property alleged to be payable under Section 3475 of the Internal Revenue Code of 1939 as then in effect. The checks which Plaintiff gave the railroads in payment of the freight bills as aforesaid included the amount of the said transportation tax.

5) During the period July 7, 1950 to August 7,

1950, [9-B] the checks with which the aforesaid freight and tax were paid were drawn upon Plaintiff's bank account with the Farmers and Merchants National Bank of Los Angeles, Los Angeles, California, in the case of bills paid from Plaintiff's mill in Los Angeles; upon the Plaintiff's account with the Metropolitan Branch of the Seattle-First National Bank, Seattle, Washington, in the case of bills paid from Plaintiff's mill in Seattle; and upon the Bank of America National Trust and Savings Association, San Francisco, California, in payment of bills paid from Plaintiff's mill in Oakland, California.

6) On August 7, 1950 Plaintiff opened a bank account with the Canadian Bank of Commerce in Vancouver, British Columbia, Canada, and the checks with which the freight bills together with the transportation tax from then to October 31, 1950 were paid as aforesaid were drawn upon said account in Canada. Plaintiff's only purpose in opening said bank account in Canada with the Canadian Bank of Commerce and in subsequently drawing checks on that account in payment of charges for transportation of property between points in the United States was to save transportation taxes.

7) The amounts of federal transportation tax paid to each of the railroads by Mr. Grout in Canada with checks drawn upon Plaintiff's bank accounts in the United States, as aforesaid and with checks drawn upon Plaintiff's bank account with the Canadian Bank of Commerce, Vancouver, Brit-

ish Columbia, Canada, as aforesaid, and the total amounts of tax so paid, were respectively as follows:

Railroad and Head Office Address	Tax Paid From U.S. Accounts	Tax Paid From Canadian Account	Total Tax
Southern Pacific RR. 65 Market St., San Francisco 5, Calif.	\$4,440.22	\$11,749.35	\$16,189.57
Union Pacific RR. 120 Broadway, New York 5, New York	570.24	2,376.06	2,946.30
Northern Pacific Ry. 176 E. 5th St., St. Paul 1, Minn.	746.76	3,303.84	4,050.60
Chicago, Milwaukee, St. Paul & Pacific RR. 516 W. Jackson Blvd., Chicago 6, Illinois	49.08	1,244.56	1,293.64
Spokane, Portland & Seattle Ry. 1101 N.W. Hoyt St., Portland 7, Oregon	229.07	857.72	1,086.79
Oregon Electric Ry. 1101 N.W. Hoyt St., Portland 7, Oregon	3.86	1.18	5.04
Pacific Motor Trucking Co., 65 Market St., San Francisco 5, Calif.	—0—	4.11	4.11
Great Northern Ry. 175 E. 4th St., St. Paul 1, Minn.	218.98	2,232.81	2,451.79
Totals.....	\$6,258.21	\$21,769.63	\$28,027.84

All said checks issued by Plaintiff in payment for the transportation services with which this suit is concerned were deposited by the carriers in banks located within the United States.

8) On or before October 31, 1950, all of said

checks drawn upon the Canadian Bank of Commerce, as aforesaid, were, before delivery of them by Mr. Grout to the carriers, presented by Mr. Grout to the said Canadian Bank of Commerce for acceptance, and stamped accepted by said bank. All of said checks were actually collected by the railroads on or before October 31, 1950, with the exception of checks for an aggregate total of freight with respect to which \$2,170 of transportation tax was paid. The latter checks were collected after October 31, 1950.

9) Both parties believe that said railroads paid [9-D] the entire sum collected by each as a tax as aforesaid to the Collector of Internal Revenue in their respective Collection Districts as required by law.

10) Neither the whole nor any part of said sums has been refunded to any of said railroads by the Defendant and no part of said sums has been repaid to Plaintiff by the respective railroads or by the Defendant, and Plaintiff has not consented to the allowance of credit or refund of any of said sums to the respective railroads.

11) The aforesaid D. L. Grout was first employed on September 8, 1947 as an Assistant Manager of the feed store operated by Plaintiff at Bellingham, Washington and was employed in this capacity at all times material herein.

12) On or about August 4, 1953, Plaintiff duly filed with the District Director of Internal Revenue, Los Angeles, California, a claim for refund for

the full amount of the aforesaid taxes plus interest alleging said taxes to have been illegally collected by the aforesaid railroads. The claim was for the sum of \$29,299.35 plus interest as provided by law, but Plaintiff is here bringing suit for \$28,027.84 of said taxes, plus interest, and waives recovery of the balance of \$1,271.51 of said taxes. Said claim was disallowed in full by the District Director of Internal Revenue in Los Angeles by letter dated July 23, 1954.

13) Plaintiff is and always has been sole owner of the claim referred to herein and has not assigned or transferred the whole or any part thereof or any interest therein. [9-E]

Dated this 15th day of October, 1957, at Los Angeles, California.

JOHN H. MAYNARD,
ROBERT W. DRISCOLL,
/s/ By JOHN H. MAYNARD,
Attorneys for Plaintiff.
LAUGHLIN E. WATERS,
United States Attorney,
EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division,
JOHN G. MESSER,
Assistant U. S. Attorney,
/s/ By JOHN G. MESSER,
Attorneys for Defendant,
United States of America.

[Endorsed]: Filed October 16, 1957.

United States District Court, Southern District
of California, Central Division

No. 20,216-PH Civil

[Title of Cause.]

MINUTES OF THE COURT

Date: October 22, 1957. At: Los Angeles, Calif.

Present: Hon. Peirson M. Hall, District Judge.

Deputy Clerk: S. W. Stacey. Reporter: Agnar
Wahlberg. Counsel for Plaintiff: John H. Maynard,
Esq. Counsel for Defendant: John G. Messer, Esq.,
Ass't. U. S. Attorney.

Proceedings: Trial: Both sides argue and stipu-
late as to certain facts, and It Is Ordered and Ad-
judged that judgment be for the defendant and that
defendant attorney prepare findings, conclusions of
law and judgment.

JOHN A. CHILDRESS,
Clerk,

/s/ By S. W. STACEY,
Deputy Clerk.

(PH 10/22/57) [9-G]

United States District Court, Southern District
of California, Central Division

No. 20216-PH Civil

ALBERS MILLING COMPANY, a Corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT

This cause came on for trial on October 22, 1957, before the Honorable Peirson M. Hall, Judge, presiding, without the intervention of a jury. Plaintiff was represented by its counsel John H. Maynard and William H. Birnie, and the defendant was represented by its counsel, Laughlin E. Waters, United States Attorney, Southern District of California, Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, and John G. Messer, Assistant United States Attorney. The Court, having heard and considered all the evidence, stipulation of facts and briefs and argument of counsel, makes the following findings of fact and conclusions of law:

Findings of Fact

I.

Plaintiff, Albers Milling Company, at all times herein mentioned was, and now is, a corporation

duly organized and existing under the laws of the State of Oregon. [10]

II.

Plaintiff is qualified to do business in the State of California and has its general offices and principal place of business in the City of Los Angeles, County of Los Angeles, California.

III.

During the period from July 7, 1950 to October 31, 1950 the plaintiff shipped various quantities of its goods and merchandise between various points in the United States over the lines of Southern Pacific Railroad, Union Pacific Railroad, Northern Pacific Railway, Chicago, Milwaukee, St. Paul & Pacific Railroad, Spokane, Portland & Seattle Railway, Oregon Electric Railway, Pacific Motor Trucking Company and Great Northern Railway. All such shipments originated and terminated within the United States. These railroads, including Pacific Motor Trucking Company, sent their bills for freight for the aforesaid shipments to the plaintiff at its offices in the United States. These bills, together with the checks of the plaintiff in payment thereof, were mailed by the plaintiff to the office of Carnation Company Limited, an affiliated Company, in Vancouver, British Columbia, Dominion of Canada. A full-time bona fide employee of one of plaintiff's feed stores, Mr. D. L. Grout, traveled twice each week from Bellingham, Washington, to Vancouver, British Columbia, picked up the freight

bills and the checks for the payment thereof at the office of Carnation Company, Limited and presented them to the agents of the aforesaid carriers in Vancouver, who accepted the checks in payment and recorded the bills as paid.

IV.

Plaintiff's only purpose in mailing its checks in payment of said bills to its Canadian affiliated company and in having Mr. Grout travel from Bellingham, Washington, to Vancouver, British Columbia, and to deliver said checks in payment of the freight bills to Canadian agents of said carriers in Canada was to save transportation taxes. [11]

V.

The carriers also added to the amounts of their freight bills and demanded from plaintiff payment of the federal tax upon the transportation of property under the provisions of Section 3475 of the Internal Revenue Code of 1939 during the period herein involved.

VI.

During the period July 7, 1950 to August 7, 1950, the checks with which the aforesaid freight and tax were paid were drawn upon plaintiff's bank account with the Farmers and Merchants National Bank of Los Angeles, Los Angeles, California, in the case of bills paid from plaintiff's mill in Los Angeles; upon the plaintiff's account with the Metropolitan Branch of the Seattle - First National Bank, Seattle, Washington, in the case of bills paid

from plaintiff's mill in Seattle, and upon the Bank of America National Trust and Savings Association, San Francisco, California, in payment of bills paid from plaintiff's mill in Oakland, California.

VII.

On August 7, 1950 plaintiff opened a bank account with the Canadian Bank of Commerce in Vancouver, British Columbia, Canada, and the checks with which the freight bills together with the transportation tax from then to October 31, 1950 were paid as aforesaid were drawn upon said account in Canada.

VIII.

Plaintiff's only purpose in opening said bank account in Canada with the Canadian Bank of Commerce and in subsequently drawing its checks on that account in payment of charges for transportation of property between points within the United States, together with taxes on said transportation, was to save transportation taxes.

IX.

The amounts of federal transportation tax paid to each of [12] the railroads by Mr. Grout in Canada with checks drawn upon plaintiff's bank accounts in the United States, as aforesaid and with checks drawn upon plaintiff's bank account with the Canadian Bank of Commerce, Vancouver, British Columbia, Canada, as aforesaid, and the total amounts of tax so paid, were respectively as follows:

Railroad and Head Office Address	Tax Paid From U.S. Accounts	Tax Paid From Canadian Account	Total Tax
Southern Pacific RR. 65 Market St., San Francisco 5, Calif.	\$4,440.22	\$11,749.35	\$16,189.57
Union Pacific RR. 120 Broadway, New York 5, New York	570.24	2,376.06	2,946.30
Northern Pacific Ry. 176 E. 5th St., St. Paul 1, Minn.	746.76	3,303.84	4,050.60
Chicago, Milwaukee, St. Paul & Pacific RR. 516 W. Jackson Blvd., Chicago 6, Illinois	49.08	1,244.56	1,293.64
Spokane, Portland & Seattle Ry. 1101 N.W. Hoyt St., Portland 7, Oregon	229.07	857.72	1,086.79
Oregon Electric Ry. 1101 N.W. Hoyt St., Portland 7, Oregon	3.86	1.18	5.04
Pacific Motor Trucking Co., 65 Market St., San Francisco 5, Calif.	—0—	4.11	4.11
Great Northern Ry. 175 E. 4th St., St. Paul 1, Minn.	218.98	2,232.81	2,451.79
Totals.....	\$6,258.21	\$21,769.63	\$28,027.84

X.

All checks issued by plaintiff in payment for the transportation services involved in this action were deposited by the carriers in banks located within the United States.

XI.

On or before October 31, 1950, all of said checks drawn on the Canadian Bank of Commerce, as set forth above, before delivery of them by Mr. Grout

to the carriers were presented by Mr. Grout to the said Canadian Bank of Commerce for acceptance, and stamped accepted by the bank. All of said checks were collected by the carriers on or before October 31, 1950, with the exception of checks for an aggregate total of freight with respect to which \$2,170.00 of transportation tax was paid. The latter checks were collected after October 31, 1950.

XII.

No part of the taxes herein involved has been refunded to any of the said carriers by the defendant, and no part of said taxes has been repaid to plaintiff by the said carriers or by the defendant. Plaintiff has not consented to the allowance of credit or refund of any of said taxes to the said carriers.

XIII.

The aforementioned Mr. Grout was first employed on September 8, 1947, as an assistant manager of the feed store operated by plaintiff at Bellingham, Washington, and was employed in that capacity during the period herein involved.

XIV.

On or about August 4, 1953, plaintiff duly filed a claim for refund of the taxes herein involved in the amount of \$29,299.35, but waived \$1,271.51 of said amount and filed this action for \$28,027.84 of said taxes. Said claim for refund was rejected by letter dated July 23, 1954. This action was filed on July 18, 1956. [14]

XV.

All conclusions of law which are or are deemed to be findings of fact are hereby found as facts and incorporated herein as findings of fact.

Conclusions of Law

I.

The Court has jurisdiction of the subject matter and of the parties hereto under the provisions of Title 28, U.S.C., Section 1346(a)(1).

II.

Plaintiff has not sustained its burden of proving that the taxes paid on the transportation of property were not subject to the tax imposed under the provisions of Section 3475 of the Internal Revenue Code of 1939 for the period herein involved.

III.

The transportation taxes imposed by Section 3475 of the Internal Revenue Code of 1939 were legally imposed and collected from the plaintiff. Plaintiff was required by Section 3475(a) of the Internal Revenue Code of 1939 to pay transportation taxes on shipments of property which were made entirely within the United States, and is not entitled to any refund of said taxes for the period involved herein. Defendant is entitled to judgment dismissing the complaint herein together with its costs.

IV.

All findings of fact which are deemed to be conclusions of law are hereby incorporated in these conclusions of law.

Judgment

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ordered, adjudged and decreed:

That the plaintiff take nothing by its complaint; that the above-entitled action be dismissed with prejudice; and that the defendant have judgment for and shall recover from plaintiff [15] the amount of defendant's costs, to be taxed by the Clerk of this Court in the sum of \$20.00.

Dated: This 7th day of November, 1957.

/s/ PEIRSON M. HALL,

United States District Judge.

Affidavit of Service by Mail Attached. [17]

[Endorsed]: Filed and Entered November 7, 1957.

—

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF
APPEALS UNDER RULE 73(b)

Notice is hereby given that Albers Milling Company, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 7, 1957.

Dated: This 31st day of December, 1957.

JOHN H. MAYNARD,

WILLIAM H. BIRNIE,

/s/ By JOHN H. MAYNARD,

Attorneys for Plaintiff. [18]

[Endorsed]: Filed January 2, 1958.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF CON-
TENTS OF RECORD ON APPEAL

Appellant, Albers Milling Company, hereby designates the following portions of the record, proceedings and evidence to be contained in the record on appeal to the United States Court of Appeals for the Ninth Circuit, in this action:

(1) Plaintiff's Complaint.

(2) Defendant's Answer.

(3) The Findings of Fact, Conclusions of Law, and Judgment of the District Court dated and filed November 7, 1957.

(4) Plaintiff's Notice of Appeal filed January 2, 1958.

(5) This designation of contents of the record to be contained in the record on appeal.

(6) The Statement of Points Upon Which the Appellant Intends to Rely Upon Appeal.

Dated this 15th day of January, 1958.

JOHN H. MAYNARD,
WILLIAM H. BIRNIE,

/s/ By JOHN H. MAYNARD,
Attorneys for Plaintiff-
Appellant. [19]

Affidavit of Service by Mail Attached. [20]

[Endorsed]: Filed January 15, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL

Appellant intends to rely upon the following points upon appeal to the United States Court of Appeals for the Ninth Circuit in this action:

(1) The District Court erred in holding that Appellant did not sustain the burden of proof that the taxes in question were not payable under Section 3475 of the Internal Revenue Code of 1939 for the period in question. The circumstances under which payment was made, as set forth in the Findings of Fact, establish that the taxes in question were improperly levied and collected and should be refunded.

(2) The District Court erred in holding that the taxes in question were legally imposed and collected from Plaintiff under Section 3475(a) of the Internal Revenue Code of 1939. This section does not tax freight charges upon the transportation of property during the period involved where payment of such charges was made outside the United States as set forth in the Findings of Fact. [21]

(3) The District Court erred in that the conclusions of law are not supported by the Findings of Fact.

(4) The District Court erred in holding that Appellant was not entitled to refund of the \$28,027.84 of federal transportation taxes paid, plus interest, and that the action should be dismissed.

(5) In the alternative, the District Court erred

in holding that Appellant was not entitled, in any event, to refund of the \$21,769.63 of taxes paid, plus interest. These taxes and the freight charges upon which they were levied were paid in Canada with checks drawn upon Appellant's account with the Canadian Bank of Commerce, Vancouver, British Columbia, Canada, as set forth in the Findings of Fact.

Dated this 15th day of January, 1958.

JOHN H. MAYNARD,
WILLIAM H. BIRNIE,

/s/ By JOHN H. MAYNARD,
Attorneys for Plaintiff-
Appellant. [22]

Affidavit of Service by Mail Attached. [23]

[Endorsed]: Filed January 15, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 23, inclusive, containing the original:

Complaint.

Answer.

Findings of Fact, Conclusions of Law and Judgment.

Notice of Appeal.

Designation of Contents of Record on Appeal.

Statement of Points upon which Appellant intends to rely on Appeal.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Dated: January 25, 1958.

[Seal] JOHN A. CHILDRESS,
 Clerk,
/s/ By WM. A. WHITE,
 Deputy Clerk. [24]

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the supplemental transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 9, inclusive, containing the original:

Stipulation of Facts.

Minute Order of Oct. 22, 1957.

Defendant's Additional Designation of Record on Appeal.

Dated: January 27, 1958.

[Seal] JOHN A. CHILDRESS,
 Clerk,
/s/ By WM. A. WHITE,
 Deputy Clerk. [27]

[Endorsed]: No. 15869. United States Court of Appeals for the Ninth Circuit. Albers Milling Company, a corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: January 25, 1958.

Docketed: February 3, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15869

ALBERS MILLING COMPANY, a Corporation,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellee.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD UPON APPEAL

Appellant, Albers Milling Company, upon appeal in the above cause from the judgment entered November 7, 1957 of the District Court of the United States, Southern District of California,

Central Division, Honorable Peirson M. Hall, Judge, presiding, hereby adopts the Statement of Points Upon Which Appellant Intends to Rely on Appeal, dated and filed January 15, 1958 in the District Court, and Appellant's Designation of Contents of Record on Appeal, dated and filed January 15, 1958 in the District Court, as its statement of points and designation of the record which is material to the consideration of the appeal under Rule 17 (6) of the United States Court of Appeals for the Ninth Circuit.

Dated this 3rd day of February, 1958.

JOHN H. MAYNARD,
WILLIAM H. BIRNIE,
/s/ By JOHN H. MAYNARD,
Attorneys for Plaintiff-
Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed February 4, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

APPELLEE'S COUNTER DESIGNATION OF
RECORD NECESSARY FOR CONSIDERA-
TION ON APPEAL AND TO BE PRINTED

Pursuant to Rule 17(6) of this Court, appellee in the above-entitled proceedings hereby additionally designates the following parts of the record as being necessary for consideration of the appeal and desires to have printed, omitting the title of Court and cause from the documents designated for printing:

1. Stipulation of Facts filed October 16, 1957;
2. Minutes of the Court of October 22, 1957.

Dated: February 10, 1958.

LAUGHLIN E. WATERS,
United States Attorney,
EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division,
JOHN G. MESSER,
Assistant U. S. Attorney,
/s/ JOHN G. MESSER,
Attorneys for United States of
America.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed February 11, 1958. Paul P. O'Brien, Clerk.